Supreme Court, U.S.
FILED
FEB 27 1995
OFFICE OF THE CLERK

CASE NO. 941529

IN THE
UNITED STATES SUPREME COURT

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First
National State Bank),

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals for The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Michael J. Rovell
Law Offices of Michael J. Rovell
55 West Monroe Street
Suite 1800
Chicago, Illinois 60603
(312) 578-9191 (tel)
(312) 578-9195 (fax)

Attorneys for Petitioner

110 pp

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner was entitled to have the Court of Appeals for the Third Circuit review his claim that there was no underlying judgment because the "judgment" was not properly entered.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED. 3

STATEMENT OF THE CASE. 6

REASON FOR GRANTING WRIT 11

ARGUMENT 12

CONCLUSION 19

APPENDIX A-1

1. October 26, 1993 Memorandum Opinion of the United States Court of Appeals for the Third Circuit A-1

2. May 19, 1992 Final Judgment of the United States District Court for the District of New Jersey. A-18

3. October 21, 1992 Opinion of the United States District Court of New Jersey. A-20

4. March 17, 1993 Memorandum Opinion and Order of the United States District Court of New Jersey. A-39

5. Letter dated September 22, 1987 to Edward L. Heil from Matthew Hudson. A-49

6. Docket sheet exhibiting minutes of 7/19/91 of the United States District Court of New Jersey. A-59

7. Certification of Lisa I. Fair dated July 13, 1992 . . . . A-60

8. Certification of Paul Kizel dated August 5, 1992 . . . A-66

9. Certification of Robert B. Nussbaum dated July 14, 1992. . . . . A-72

10. Docket sheet exhibiting minutes of 12/28/88 thorugh 8/7/92 . . . . . A-75

11. Notice of Appeal dated March 31, 1993 For the United States District Court of New Jersey. A-78

12. Order of the United States Court of Appeals for the Third Circuit dated November 28, 1994 . . A-80

13. Page 1 of Judge Gerry's letter opinion of October 3, 1990. . . . . A-82

TABLE OF AUTHORITIES

CASES

Allah v. Suprerior Court of State of California, 871 F.2d 887 (9th Cir. 1989). 13

Calhoun v. United States, 647 F.2d 6, 8 (9th Cir. 1981). 14

Carter v. Beverly Hills Sav. & Loan Ass'n., 884 F.2d 1186, 1189 (9th Cir. 1989). 14

Harris v. Martin, 834 F.2d 361 (3rd Cir. 1981). 17, 18

Honneus v. Donovan, 691 F.2d 1, 2 (1st Cir. 1982). 11, 15

Jordan v. Gilligan, 500 F.2d 701, 704, 710 (6th Cir. 1974) 11, 15

Koshatka v. Philadelphia Newspapers, Inc., 762 F.2 329 (3d. Cir. 1992) . .17, 18

In re Seiscom Delta, Inc., 857 F.2d 279, 283 (5th Cir. 1988). 13

United States v. Indrelunas, 411 U.S. 216 (1973). 13, 16

STATUTES AND OTHER AUTHORITIES

28 U.S.C. §1254(1). 3

Fedearl Rule of Civil Procedure Rule 1 3

Federal Rule of Civil Procedure Rule 60(b) 15, 16

Federal Rule of Civil Procedure
Rule 54 4

Federal Rule of Civil Procedure
Rule 58 . . . . . 4, 5

Federal Rule of the United District Court
Rule 22 . . . . . 5, 6

OPINIONS BELOW

The United States District Court for the District of New Jersey entered summary judgment for respondent First Fidelity and against petitioner Hudson as to liability on June 18, 1991, referred to in the Appendix to this brief A - 3. The parties subsequently entered into a stipulation and order as to damages which, along with a "final judgment", was entered by the district court on May 19, 1992 and entered on the docket on May 22, 1992, contained at A - 18-19.

Hudson filed a motion under Federal Rule of Appellate Procedure 4(a)(5) to enlarge the time to appear or, alternatively, to enter a final judgment in accordance with the Federal Rules of Civil Procedure. The district court denied the motion by opinion and order dated October 21, 1992, contained at A - 20-38. Hudson filed a motion to

reconsider which the district court denied by opinion and order dated March 17, 1993 contained at A - 39-48.

On October 27, 1994, the United States court of Appeal for the Third Circuit entered a unreported opinion which affirmed the trial court's denial of Hudson's motion under Federal Rule of Appellate Procedure 4(a)(5) for extension of time for appeal and alternatively for his motion to enter judgment in accordance with the Federal Rules of Civil Procedure and is contained at A -1-17.

JURISDICTION

On October 27, 1994, the United States Court of Appeals for the Third Circuit issued an unreported opinion affirming the district court's October 21, 1992 order denying Hudson's motion under Federal Rule of Appellate Procedure 4(a)(b) for extension of time for appeal

and alternatively for entry of a judgment in accordance with the Federal Rules of Civil Procedure. On November 28, the Third Circuit denied defendant's motion for rehearing. A - 80-81. Jurisdiction of this Court to review the Third Circuits' order by want of certiorari arises under 28 U.S.C. §1254(1).

STATUTES INVOLVED

A Federal Rule of Civil Procedure involved is Rule 1 which provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Another Federal Rule of Civil Procedure involved is Rule 54 which provides in part:

> (a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Yet another Federal Rule of Civil Procedure involved is Rule 58 which states:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment

> without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

The Local Federal Rule of the United District Court for the District of New Jersey involved is Rule 22 which

provides in part:

> B. In all cases contemplated by Rule 58(2) of the Civil Rules and when the Court makes any judgment as defined in Rule 54(a) of the Civil Rules, the prevailing party shall, within 5 days after determination, submit a judgment or order to the Court on notice to his or her adversary.

STATEMENT OF THE CASE

As the underlying facts of the dispute are irrelevant to the legal issue for which review is sought, petitioner has purposely kept its recitation of facts to a minimum.

Petitioner along with others, guaranteed a $15,000,000 construction loan, made by First Fidelity to Market Towers Associates ("MTA"), a subsidiary of American Property Group, Inc. ("APG"), in which petitioner was a major shareholder

and CEO. A - 82-83. Petitioner claimed that he was told by appellee that he was only guarantying the completion of the construction project, known as the Marina Club, while Esply-Tyas P.L.C., a London based company, was the guarantor for repayment of the loan. A - 57-58.

In 1986, the loan was restructured by First Fidelity, the prime debt was extinguished and petitioner, by the resident in the United Kingdom, along with Esply-Tyas, and APG, agreed to become guarantors, however Esply-Tyas never executed the documents. A - 55-57. The evidence was undisputed that respondents took the signature page from the document that petitioner signed and affixed it to a different document that petitioner had never seen, which inter alia removed Esply-Tyas as a guarantor. A- 55-57.

Despite what petitioner believed

to be numerous genuine issues of material fact, the trial court entered a summary judgment as to liability. A - 3. In order to assess damages, the court scheduled a hearing to determine the value of the building which respondent received when it foreclosed on its loan. In order to save judicial time and expense to the parties, petitioner and respondent stipulated to the value of the building with the express understanding that should the summary judgment be reversed the stipulations to the value of the property were null and void. A - 59; A - 61-62.

Counsel for respondent First Fidelity prepared the stipulation and the judgment. A - 62. After it was signed by all counsel, he forwarded it to the clerk, asked the clerk to have the trial court enter the judgment and that he, counsel for the plaintiff, rather than the clerk,

would notify Hudson's lawyers. A - 62. The order and judgment were entered on May 19, 1992, filed in the clerk's office on May 20, 1992, entered on the docket on May 22, 1992 (A - 18-19) and sent to respondent's counsel. A - 72-74.

Mr. Kizel, the attorney for respondent First Fidelity at the time, purported to send a copy of the executed judgment to Chicago counsel by cover letter addressed to Chicago counsel and copies to local counsel. A - 66-71. Petitioner's local New Jersey counsel received the judgment but petitioner's Chicago counsel received only the cover letter and did not receive the judgment. A - 63-65; A - 73. Upon inquiry initiated by Chicago counsel, petitioner and Chicago counsel learned of the judgment. A - 62. However, by that time 35 days had elapsed. Petitioner challenged in the district

court whether there was a final judgment and sought an extension of time to appeal pursuant to Rule 4(a)(5). A - 75-76. The district court found that the judgment was properly entered and denied the extension of time to appeal. A - 21-38.

Petitioner filed a timely notice of appeal from the district court's orders. A - 78-79. The Third Circuit affirmed the trial court in an unpublished opinion ruling (1) that the issue of whether there was a judgment was a matter of discretion; and (2) the court had not abused its discretion by failing to extend the time to appeal. A - 1-17.

As is set forth below, the issue of whether there is a judgment properly entered in this case is a matter of law which petitioner was entitled to have decided by the Court of Appeals. In this Petition, Hudson is not asking the Court

to review the denial of the extension of time which the Third Circuit itself characterized as appearing "harsh" because that was a matter of discretion. A - 17.

REASON FOR GRANTING WRIT

Petitioner respectfully submits that the Court should grant the writ of certiorari and vacate the judgment of the Third Circuit Court of Appeals and remand the case to that court to determine whether a final judgment was ever entered in this case to prevent a manifest injustice and to reconcile the conflict between the Third Circuit's decision and the Sixth and First Circuit Court of Appeals decisions in Jordan v. Gilligan, 500 F.2d 701, 704, 710 (6th Cir. 1974) and Honneus v. Donovan, 691 F.2d 1, 2 (1st Cir. 1982)

Further, petitioner respectfully submits that the error is so apparent that

the Court can dispose of this appeal with the order requested without extensive briefing and oral argument.

Finally, this Court's aid is needed so that petitioner, a Canadian lawyer who lives in Scotland and is being forced into bankruptcy there by respondent, can file an appeal on the merits of a $13 million summary judgment that was entered against him.

ARGUMENT

The first paragraph of the "final order" contains a recital of some of the pleadings. A - 18-19. Petitioner contends that the May 19 order was not a final judgment as it was not prepared or entered as required by the Federal Rules of Civil Procedure.

However, Rule 54(a) specifically states that "[a] judgment shall not contain a recital of pleadings, the report

of a master, or the record of prior proceedings." Because the May 19 order is not a "judgment" as that term is defined in Rule 54, it cannot be a judgment which is effective pursuant to Rule 58. In United States v. Indrelunas, 411 U.S. 216 (1973), the leading case under Rule 58, this Court held that Rule 58 must be "mechanically applied." 411 U.S. at 222. When, however, a notice of appeal has not been filed, such as here, then as set forth below, "Rule 58 should be applied, where reasonably possible, to protect the right to appeal." In re Seiscom Delta, Inc., 857 F.2d 279, 283 (5th Cir. 1988).[1]

---

[1]See also, Allah v. Superior Court of State of California, 871 F.2d 887 (9th Cir. 1989), the court held a notice of appeal was timely even though it was filed 90 days after the order was entered because "[a]bsent compliance with these requirements, 'a party will not ordinarily be found to have exceeded any of the time periods set forth in Fed. R. App. P. 4(a).'" 871 F.2d at 890 (citing Vernon v. Heckler, 811 F.2d 1274, 1276 (9th Cir.

Rule 58 also provides that "the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment . . . ." Here, the final judgment was not prepared by the clerk, nor was it signed by him. The executed final judgment was prepared by First Fidelity's attorney.

Finally, the deputy clerk's failure to prepare and sign the "Final Judgment" in this case violates the mandate of Rule 58. In Carter v. Beverly Hills Sav. & Loan Ass'n., 884 F.2d 1186, 1189 (9th Cir. 1989), the court found that a file stamp stating "Entered March 26, 1985 Clerk, U.S. District Court Central District of California by SB deputy" was insufficient under Rule 58 because "Rule 58 contemplates a minute order prepared by

---

1987) and Calhoun v. United States, 647 F.2d 6, 8 (9th Cir. 1981)).

a deputy clerk who then signs the minute order he prepares." 886 F.2d at 1189. Thus, the deputy clerk's failure to prepare and sign the "Final Judgment" in this case violates the mandate of Rule 58.

The standard of review of motions under Rule 60(b)(4) to vacate a judgment as void has been held to be plenary as "[a] void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." Jordan v. Gilligan, 500 F.2d 701, 704, 710 (6th Cir. 1974) (denial of Rule 60(b)(4) motion to vacate order awarding attorney's fees against State of Ohio reversed as State is constitutionally immune from the award and the judgment was therefore void). See also Honneus v. Donovan, 691 F.2d 1, 2 (1st Cir. 1982) ("If [defendant's] motion is construed as having been made pursuant

to 60(b)(4), then the district court had no discretion because a judgment is either void or it is not").

All motions under Rule 60(b) are therefore not discretionary. Just as the determination of whether the judgment is void under Rule 60(b)(4) is not discretionary, the test of finality and whether a judgment is a judgment at all is similarly an objective one which is subject to this Court's de novo review.

In fact, petitioner's research has failed to reveal any cases where the court has held that the question of whether a judgment is final is a matter of discretion. Such a conclusion would run counter to the United States Supreme Court's analysis in United States v. Indrelunas, 411 U.S. 216 (1973), and its progeny which have set forth a bright line test as to whether a purported "judgment"

is indeed a judgment pursuant to the Federal Rules of Civil Procedure regardless of what it is called.

The Third Circuit did not review these issues. The Third Circuit refused to review these issues because it felt that the district Court's rejection of petitioner's claim was a matter of discretion. Specifically, the court held:

> We review the district court's denial of Hudson's motion to vacate final judgment pursuant to Fed.R.Civ.P. 60(b), and for reconsideration pursuant to Local Rule 12-I, for an abuse of discretion. See Harris v. Martin, 834 F.2d 361, 364 (3d Cir. 1987) (Rule 60(b)); Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1992) (motion for reconsideration). Because we find no merit with respect to Hudson's contentions in this regard, we conclude that the district court did not abuse its discretion, and will affirm the denial of these motions.

A - 8.

Even the cases cited by the

Third Circuit support the proposition that petitioner was entitled to have these issues addressed. In Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329 (3d Cir. 1985), the court held that if the motion is based upon a legal precept the review is plenary. And in fact, the court's review in that case was plenary. In another case cited by the Third Circuit, Harris v. Martin, 834 F.2d 361 (3rd Cir. 1981), the United States Parole Commission moved to vacate the judgment pursuant to Rule 60(b)(5) on the ground that a prior unrelated judgment had been reversed.

For these reasons, this matter should be remanded to the Third Circuit to determine whether a final judgment was entered.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari and then remand the case to the Third Circuit to review the claims raised by Petitioner as to the affirming of the underlying judgment.

Respectfully submitted,

MICHAEL J. ROVELL
(Counsel of Record)

Attorney for Petitioner

Dated: February 27, 1995